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No. 02-1822

In the Supreme Court of the United States

GARY L. ANDERSEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the courts below properly held, applying the settled principles established by this Court's precedents, that this action to recover for injuries caused by a United States carrier-launched aircraft falls within federal admiralty jurisdiction.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A9) is reported at 317 F.3d 1235. The opinion of the district court (Pet. App. B1-B19) is reported at 245 F. Supp. 2d 1217.

JURISDICTION

The judgment of the court of appeals was entered on January 7, 2003. The petition for a writ of certiorari was filed on April 7, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Article III, Section 2, Clause 1 of the United States Constitution extends the federal judicial power to "all Cases of admiralty and maritime Jurisdiction." That authority is embodied in 28 U.S.C. 1333, which grants federal district courts "original jurisdiction, exclusive of the courts of the States, of * * * Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled."

The Suits in Admiralty Act (SAA), 46 U.S.C. App. 741 *et seq.*, provides that, "[i]n cases where * * * a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States." 46 U.S.C. App. 742. The Public Vessels Act (PVA), 46 U.S.C. App. 781 *et seq.*, also stipulates that "[a] libel in personam in admiralty may be brought against the United States * * * for damages caused by a public vessel of the United States." 46 U.S.C. App. 781. Suits authorized by the PVA or the SAA "may be brought only within two years after the cause of action arises." 46 U.S.C. App. 745, 782.

The Extension of Admiralty Jurisdiction Act (Extension Act), 46 U.S.C. App. 740, provides that federal admiralty jurisdiction shall "include all cases of damages or injury, to person or property, caused by a vessel on navigable water," even if such injury occurs on land. The Extension Act further provides that, "as to any suit against the United States for damage or injury done or consummated on land by a vessel on navigable waters, the [PVA] or [SAA], as appropriate, shall constitute the exclusive remedy." *Ibid.* (internal citations omitted). The Extension Act also provides that "no

suit"—including one under the PVA or SAA—"shall be filed against the United States until there shall have expired a period of six months after the claim has been presented in writing to the Federal agency owning or operating the vessel causing the injury or damage." *Ibid.*

b. The Federal Tort Claims Act (FTCA) makes the United States liable for "personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." 28 U.S.C. 1346(b)(1); see 28 U.S.C. 2674. The FTCA's waiver of sovereign immunity, however, expressly excludes "[a]ny claim for which a remedy is provided by [the PVA or SAA], relating to claims or suits in admiralty against the United States." 28 U.S.C. 2680(d). As a result, "any claim" that is actionable in admiralty under the PVA or SAA is barred under the FTCA.

2. Petitioner is a civilian employee of a government contractor that operates at the Cerro Matias Observation Post at the Atlantic Fleet Weapons Training Facility on Vieques Island, Puerto Rico. On April 19, 1999, an F/A-18C military aircraft took off from the aircraft carrier USS *John F. Kennedy* and dropped two bombs during a training exercise on Vieques. The bombs missed their targets on the training range, landed near the Cerro Matias Observation Post, and injured petitioner. Pet. App. A2.

On March 18, 2001—nearly 23 months after he sustained his injuries—petitioner filed an administrative claim with the Navy. That claim was denied on April 10, 2001. On April 18, 2001—one month after he filed his administrative claim—petitioner filed this action against the United States in the District Court for the Middle District of Florida. He alleged that the United

States negligently failed to provide a safe working environment for him, resulting in physical and mental injuries. He asserted claims under the FTCA and, alternatively, the PVA, SAA, and Extension Act. Pet. App. A2.

3. The district court granted the government's motion to dismiss. Pet. App. B1-B19. The court first held that petitioner's FTCA claim is barred by 28 U.S.C. 2680(d), discussed above, if admiralty jurisdiction exists. Pet. App. B6. Next, applying the location and connection tests of *Jerome B. Grubart, Inc.* v. *Great Lakes Dredge & Dock Co.* (*Grubart*), 513 U.S. 527 (1995), the court held that this action falls within admiralty jurisdiction and that, therefore, it may be "maintained appropriately only as an admiralty case under the PVA or the SAA." Pet. App. B13. Finally, the court held that petitioner's claims under the PVA and SAA are barred because petitioner failed to meet the statutory prerequisite, discussed above, that in a case under the Extension Act, a plaintiff must wait at least six months after filing an administrative claim to file a lawsuit under the PVA or SAA. *Id.* at B13-B19.

In finding that admiralty jurisdiction exists, the district court explained that the "location" test looks to "whether the tort occurred on navigable water or whether injury *suffered on land was caused by a vessel on navigable water*." Pet. App. B9 (quoting *Grubart*, 513 U.S. at 534). In addition, the court noted, "[i]t is settled that 'maritime law . . . ordinarily treats an "appurtenance" attached to a vessel in navigable waters as part of the vessel itself,'" such that an injury caused by an appurtenance is treated as one caused by the vessel. *Id.* at B10 n.4 (quoting *Grubart*, 513 U.S. at 535). The court found that the aircraft that released the bombs that injured petitioner is an "appurtenance"

to the aircraft carrier that it was "assigned [to], attached to, and operating from" at the time of the training exercise, and that, therefore, under settled maritime law, "the injuries giving rise to this lawsuit were caused by a vessel on navigable waters." *Id.* at B12.

4. The court of appeals affirmed in a per curiam decision. Pet App. A1-A9. The court agreed with the district court's analysis that, under the principles applied in *Grubart*, admiralty jurisdiction exists in this case and precludes petitioner's claim under the FTCA. *Id.* at A4-A7. In so holding, the court found that the military aircraft that released the bombs that injured petitioner is an "appurtenance" to the aircraft carrier from which it took off on the training mission at issue, such that petitioner's injuries are "deemed to have been caused by the vessel." *Id.* at A4-A6. The court explained that, in general, an aircraft carrier's "aircraft are an extension of the ship's ears (electronic monitoring), eyes (surveillance), and provide offensive and defensive capability." *Id.* at A5. And "the aircraft [in this case] was assigned to the Kennedy, specifically, and when conducting the bombing exercises, the aircraft was carrying out the Kennedy's mission by testing its offensive and defensive capabilities in air-to-ground strikes." *Ibid.*; see *id.* at A6 n.4.

The court of appeals further held that petitioner's admiralty claims are barred because he cannot satisfy the jurisdictional prerequisite of the Extension Act that a plaintiff must wait six months after filing an administrative claim before initiating suit. Pet. App. A7-A9.

ARGUMENT

The court of appeals' per curiam decision involves a fact-bound application of the jurisdictional principles established by this Court's admiralty decisions. Although the facts of this admiralty case are somewhat unusual, the decision below is correct and does not conflict with any decision of this Court or any other court of appeals. The sole ground for certiorari that is presented by petitioner is that the Court should "revisit and further refine the factors for determining whether an item causing injury is appurtenant to a vessel on navigable waters." Pet. 8; see Pet. 4-8. Petitioner has not demonstrated that such guidance is needed and, in any event, this case would be an ill-suited vehicle for the Court to revisit this area of law in light of its unique facts.

1. As this Court recognized in *Grubart*, "maritime law * * * ordinarily treats an 'appurtenance' attached to a vessel in navigable waters as part of the vessel itself" and thus torts committed by an appurtenance are deemed for purposes of maritime law to be committed by the vessel itself. 513 U.S. at 535 (citing *Victory Carriers, Inc.* v. *Law*, 404 U.S. 202, 210-211 (1971); and *Gutierrez* v. *Waterman S.S. Corp.*, 373 U.S. 206, 209-210 (1963)).

Victory Carriers involved a claim brought by a longshoreman who was injured by a forklift on land while loading cargo alongside a ship. 404 U.S. at 203. In holding that this claim did not fall under admiralty jurisdiction, the Court noted that it lacked the four "typical elements of a maritime cause of action": "[1] respondent * * * was not injured by equipment that was part of the ship's usual gear or that was stored on board, [2] the equipment that injured him was in no

way attached to the ship, [3] the forklift was not under the control of the ship or its crew, and [4] the accident did not occur aboard ship or on the gangplank." *Id.* at 213-214. Lower courts have applied the *Victory Carriers* factors in determining whether an injury-causing item is an appurtenance to a vessel triggering maritime jurisdiction under the Extension Act.

The fact pattern in which the admiralty jurisdiction question arises in this case is admittedly novel, but the courts below properly held that the aircraft that released the bombs that injured petitioner is an "appurtenance" to the aircraft carrier to which the fighter was stationed. As the court of appeals explained, "the aircraft was assigned to the Kennedy" and "its operations were controlled aboard the Kennedy at all times." Pet. App. A5. In addition, "when conducting the bombing exercises [that injured petitioner], the aircraft was carrying out the Kennedy's mission by testing its offensive and defensive capabilities in air-to-ground strikes." *Ibid.* More generally, aircraft assigned to aircraft carriers are considered by the military to be "an extension of the ship's ears (electronic monitoring), eyes (surveillance), and provide offensive and defensive capability." *Ibid.* In short, such an aircraft is an integral component of the aircraft carrier itself and therefore reasonably regarded as an appurtenance to the ship.

2. Petitioner argues (Pet. 4-8) that the lower courts have failed to apply the *Victory Carriers* test in a "consistent manner." Pet. 4. That is incorrect. The results reached in the cases relied upon by petitioner are attributable to the varying facts in those cases rather than any actual doctrinal division on the proper application of the factors discussed in *Victory Carriers*. In addition, none of the lower court decisions cited by

petitioner calls into question the result reached by the court of appeals in applying the settled jurisdictional principles discussed above to the admittedly atypical facts of this case.

a. For example, in the cargo-related cases cited by petitioner (Pet. 5-7), the courts generally declined to apply admiralty jurisdiction to pier-side accidents caused by a defect in, or the negligent operation of, *shore-based* equipment, or by an appurtenance that was not being used for the ship's typical purposes. See *Kinsella* v. *Zim Israel Navigation Co.*, 513 F.2d 701 (1st Cir. 1975) (injury to longshoreman who tripped and fell over plywood dunnage that had been removed from a ship and spread over railroad tracks to unload cargo); *Davis* v. *W. Bruns & Co.*, 476 F.2d 246 (5th Cir. 1973) (injury to longshoreman caused by a land-based conveyor belt used to unload bananas from a ship); *Mascuilli* v. *American Exp. Isbrandtsen Lines, Inc.*, 381 F. Supp. 770 (E.D. Pa. 1974) (injury to longshoreman caused by lumber dunnage that had slipped from a forklift operated by longshoreman's co-worker, where dunnage had been deposited on land and unbanded before being moved by the forklift), aff'd, 511 F.2d 1394 (3d Cir.), cert. denied, 423 U.S. 834 (1975).[1]

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[1] *Crotwell* v. *Hockman-Lewis Ltd.*, 734 F.2d 767 (11th Cir. 1984), is consistent with the cargo-related cases discussed above. There, a construction worker claimed that his injury, sustained while unloading an air compressor from a truck, was caused by defective crating attributable to a shipowner's negligence. *Id.* at 767-768. The court declined to apply admiralty jurisdiction on the ground that the injury had insufficient connection to traditional maritime activities, as the injury occurred far from the port some seven days after the compressor had been unloaded from a ship. *Id.* at 768-769. Because *Crotwell* was decided on the basis of the

The lone case cited by petitioner (Pet. 5) that found admiralty jurisdiction in a cargo-unloading injury situation is consistent with *Victory Carriers*. In *Garrett* v. *Gutzeit*, 491 F.2d 228 (4th Cir. 1974), a longshoreman was injured when wire bands used to wrap bales of cargo broke and the cargo fell on him. In holding that the case was within admiralty jurisdiction, the court explained that "[t]he instrumentality of the injury was a ship's cargo container (the wire bands around the bales)" and that "[c]argo containers coming from a vessel's hold satisfy the appurtenance requirement of *Victory Carriers*." *Id.* at 232. Indeed, as the *Garrett* court observed, in *Victory Carriers* this Court itself recognized that "defective cargo containers being unloaded from a ship located on navigable waters" may be an appurtenance to the vessel and thus establish admiralty jurisdiction. 404 U.S. at 210 (discussing *Gutierrez, supra*).[2]

Moreover, to the extent that there is any inconsistency in the results in the cargo cases cited by petitioner in determining whether an item is an appurtenance to a vessel under *Victory Carriers*, this case—which does not involve a cargo fact pattern—would be

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connection test, it is not inconsistent with cases that focus on the location test.

[2] Petitioner claims (Pet. 6) that the *Garrett* court "noted the confusion concerning the right to recover under maritime law and the restrictions that apply to maritime jurisdiction." The confusion that *Garrett* noted, however, pertains to the warranty of seaworthiness and is not relevant to the present case. See *Garrett*, 491 F.2d at 231 ("There appears to be no little confusion concerning restrictions upon the right to recover under maritime law. This confusion is attributable, in great measure, to the fact that the scope of admiralty jurisdiction is not always equal to the breadth of the seaworthiness warranty.").

an inapt vehicle for clarifying the circumstances in which admiralty jurisdiction attaches in that context.

b. Nor does the decision below conflict with *Scott* v. *Trump Indiana, Inc.*, 337 F.3d 939 (7th Cir. 2003). In *Scott*, a life raft was launched from a casino ship for inspection. When a land-based crane lifted the life raft from the water, "a gust of wind caused the [life raft] to sway" and it hit the plaintiff, who was standing on a pier. *Id.* at 941-942. As the court of appeals explained, the crane was not an appurtenance to the ship from which the life raft was launched; the "crane was a completely land-based piece of equipment" and was "never aboard" the casino ship. *Id.* at 944. Although it was a "closer question," the court also held that the life raft was not an appurtenance to the ship, since at the time of the plaintiff's injury it was not under the control of the ship's personnel. *Ibid.* (citing *Victory Carriers*, 404 U.S. at 214). More to the point, in so holding, the court specifically distinguished this case, explaining that, "[u]nlike the aircraft in *Anderson*, which was controlled at all times by personnel aboard the Kennedy, at the time of Scott's injury, the life raft was not under the control of [the ship's] personnel." *Ibid.* (internal citations omitted).

c. The remaining decisions cited by petitioner do not involve the application of the *Victory Carriers* test for an appurtenance because none of the cases involved an injury on land allegedly caused by an appurtenance to a vessel, the factual situation that the *Victory Carriers* test sought to address. See *Gowen, Inc.* v. *F/V Quality One*, 244 F.3d 64 (1st Cir.) (whether a maritime lien on a boat covered the boat's fishing permit), cert. denied, 534 U.S. 886 (2001); *Watson* v. *Massman Constr. Co.*, 850 F.2d 219 (5th Cir. 1988) (construction worker fell from allegedly defective shore-side equipment into the

Mississippi River); *Duluth Superior Excursions, Inc.* v. *Makela*, 623 F.2d 1251 (8th Cir. 1980) (plaintiff injured on land by driver who became intoxicated on a cruise ship); *Gonzalez* v. *M/V Destiny Panama*, 102 F. Supp. 2d 1352 (S.D. Fla. 2000) (whether a maritime lien on a boat covered its uninstalled replacement engines).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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